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Case No. 90-901

IN THE UNITED STATES SUPREME COURT

October-June 1990 Term

Donald K. Alexander, Petitioner

v.

Evans & Dixon, et al., Respondents

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

Brief in Opposition to Allowance of Petition for Writ of Certiorari

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QUESTIONS PRESENTED

1. Whether the individual members of the Missouri Thirteenth Judicial Circuit Bar Committee are entitled to judicial immunity in performing their function of reviewing applications for admission to the bar.

2. Whether the District Court erred in granting protective orders which stayed Petitioner's discovery pending rulings on case-dispositive motions.

3. Whether a plaintiff proceeding under 42 U.S.C. §1983 is required to allege conspiracy with sufficient specificity to show a meeting of the minds and a common plan of action among the alleged conspirators.

4. Whether a plaintiff alleging conspiracy in a 42 U.S.C. §1983 action can overcome summary judgment affidavits specifically denying the alleged conspiratorial facts with counter-affidavits alleging conspiracy in a conclusory manner.

5. Whether Petitioner's 42 U.S.C. §1983 claim was not ripe for determination because Petitioner failed to exhaust his state remedies.

6. Whether a jury could reasonably return a verdict in Petitioner's favor based on Petitioner's allegations.

LIST OF PARTIES

Petitioner

Donald K. Alexander
Columbia, Missouri

Respondents

Evans & Dixon Law Firm
St. Louis, Missouri

Individual Members of the
Missouri Board of Bar Examiners:
Richard K. Andrews
Gerre S. Langton
David P. Macoubrie
John L. Oliver, Jr.
Lori J. Levine

Individual Members of the
Missouri Thirteenth Judicial Circuit Bar Committee:
Loramel P. Shurtleff
Thomas M. Dunlap
Bruce Beckett
Betty K. Wilson
Nancy Galloway

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CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS

§484.040 RSMo. (1986):

The power to admit and license persons to practice as attorneys and counselors in the courts of record of this state, or in any of them, is hereby vested exclusively in the supreme court and shall be regulated by rules of that court.

Missouri Supreme Court Rule 5.10:

There is hereby established in each Judicial Circuit a Bar Committee to be composed of not less than four lawyer members and not less than one lay member, who shall be appointed by this Court and shall serve without compensation. The term of each member shall be for four years, with the term of at least one lawyer member expiring each year. Each member shall serve until his successor is appointed and qualified. Members of the Committee in excess of five shall likewise be appointed to serve for staggered terms of not to exceed four years. After each member's term expires, his successor shall be appointed for a term of four years. It is declared to be the general policy of this Court that a member shall not be called on to serve more than two successive terms. Each member shall take an oath that he will fairly and impartially, to the best of his ability, administer Rules 4, 5 and 6.

In the event this Court appoints more than five and as many as ten members of a Bar Committee in any Judicial Circuit, the Committee may sit en banc or in divisions as the Committee may from time to time determine. Each Division shall be composed of not less than

four lawyer members and not less than one lay member and shall have the same powers and duties and follow the same procedures as provided by these Rules for the full Committee. A Division shall designate one of its members as the presiding officer and one to keep minutes of its proceedings. The Chairman of the full Committee shall be the chief administrative officer and shall assign investigations and hearings to the Divisions so that no more than one Division shall have jurisdiction of the same matter. The Committee Chairman may sit as a member of any Division.

A Bar Committee or Division shall not be disabled from functioning simply because the lay position has not been filled or becomes vacant, and a formal or informal hearing may proceed even though no lay member is present.

Missouri Supreme Court Rule 5.26:

In addition to the other powers and duties conferred upon them, the General Chairman, the Advisory Committee, and the Circuit Bar Committees shall aid and assist the Board of Law Examiners in their duties under Rule 8.07.

Missouri Supreme Court Rule 5.27:

Nothing in this Rule 5 shall be construed as a limitation upon the powers of this Court to govern the conduct of its officers and any appointment or employment hereunder may be revoked at will. No provision of this Rule 5 shall limit the right of any individual to seek any remedy afforded by law. However, it is the intent of this Court that members of the Advisory Committee, Circuit Bar Committees, staff attorneys, special representatives, staff, and all appointed or employed counsel acting in the course and scope of their official duties shall be

considered as acting under the authority of this Court, and as such shall be a part of the Judicial branch of state government and shall be protected and be free from suits and judgments for damages. This Rule 5 shall not constitute an exclusive method for regulating the practice of law or the unauthorized practice of law by laypersons or corporations.

Missouri Supreme Court Rule 8.07:

No applicant for registration as a law student and no applicant to take the bar examination shall be registered or examined until the respective application has been considered and approved by the Board of Law Examiners. Prior to granting approval for registration as a law student and prior to granting approval to take the bar examination, the Board of Law Examiners shall, in each instance, investigate the moral character of the applicant. In so doing, it may call upon the General Chairman of the Bar Committees, the Advisory Committee and the Bar Committee of the Circuit where the applicant resides to make such investigation and report its findings to the Board, and the Board may make such further investigation as may be necessary to fully inform itself concerning the moral fitness of the applicant. The Board may require applicants to submit fingerprints. In no event will permission be granted to register as a law student or to take the bar examination until the investigation as to moral character has been completed.

In every such instance the Board may obtain such information as bears upon the character, fitness and general qualifications of the candidate and take and hear testimony, administer oaths and affirmations and compel, by subpoena issued by this Court, at the request of the applicant or of the Board, the attendance of witnesses and the production of books, papers and documents. Any

member of the Board may administer such oaths and affirmations.

Missouri Supreme Court Rule 8.12:

Should the Board of Law Examiners refuse to grant approval to any applicant for registration as a law student or any applicant to take the bar examination, or to any applicant for admission to practice without examination, such applicant may have a hearing by the Board by serving a written request for a hearing upon the Secretary of the Board within fifteen days after notice of refusal has been served upon the applicant. The written request for the hearing made to the Board shall advise the Board of the matters desired to be covered at the hearing. The applicant shall have the right to be represented by counsel, and present evidence, at the time and place fixed by the Board for the hearing. In any such matter, the Board may order a hearing on its own motion either before or after action on any application.

In connection with such hearings, the Board shall have the power to take and hear testimony, administer oaths and affirmations and at the request of the applicant or the Board, the Clerk of this Court shall issue subpoenas for witnesses and subpoenas duces tecum. Any member of the Board may administer such oaths and affirmations. A quorum of the Board may hold hearings but any decision shall be by a majority of the Board.

The Board's decision upon such hearing shall be made in writing setting forth the reasons therefore, and a copy thereof shall be served upon the applicant. An aggrieved party may appeal to this Court from an adverse decision by filing a notice of appeal which shall set forth in writing the facts and reasons on which it is based. Six copies shall be filed with the Secretary of the Board within fifteen days after the Board's order or ruling has been

served upon applicant. The Board shall within thirty days after receipt of the notice of appeal file with the Clerk of this Court the original notice of appeal together with a statement of the Board's action and position in the matter, and when evidence has been taken, a transcript of such portions of the evidence as considered necessary by the Board. A copy of the statement of the Board and such transcript shall at the same time be served upon the applicant. The applicant may, at applicant's own expense, file a transcript of any other portion of the evidence heard by the Board as applicant considers necessary and serve a copy upon the Secretary of the Board. This Court will not hear or receive additional evidence.

This Court on application of the Board may make such orders as it shall consider appropriate with regard to payment of or security for the costs and other expenses of hearings and appeals provided for herein.

STATEMENT OF CASE

Nature of Case

Petitioner (called "Alexander" in this brief) filed this action in the United States District Court, Western District of Missouri, Central Division, under 42 U.S.C. §1983, alleging that the Respondents conspired to deprive him of federally protected rights and privileges by denying his Application for Law Student Enrollment. Alexander also alleged criminal conspiracy against him under 18 U.S.C. §241 (he does not contest dismissal of this claim in his Petition for Writ of Certiorari; therefore, it is not addressed in this brief). Alexander sought actual damages of $2,505,000 and punitive damages of $5,010,000.

Course of Proceedings

The course of the proceedings below—insofar as relevant to the Petition for Writ of Certiorari—is derived from the District Court's docket sheet and from pleadings and orders in the District Court file. All date references are to the year 1990.

Alexander filed his original Petition [*sic*] on January 3. On January 30 Alexander moved for leave to file a First Amended Petition [*sic*]; District Judge Scott O. Wright granted leave on February 13.

The Missouri Thirteenth Judicial Circuit Bar Committee (on behalf of the individual members of which this brief is submitted) moved for dismissal on the ground of failure to state a cause of action and for FRCP 11 sanctions on January 18. On February 2 it renewed its motion to dismiss as to the First Amended Petition.

Evans & Dixon moved for summary judgment or alternatively for dismissal and for FRCP 11 sanctions on January 22.

The Board of Law Examiners moved for additional time to plead on January 22; this motion was granted on February 13 and the board was given until February 16 to plead.

Alexander had filed a certificate of service of interrogatories, document requests and requests for admissions on February 5. On February 6 Alexander filed a notice of 28 depositions. Motions for protective orders to stay discovery were filed on February 7 by the Board of Law Examiners, on February 8 by Evans & Dixon, and on February 22 by the Thirteenth Circuit Bar Committee. On February 13 Judge Wright granted a stay of all discovery.

On February 13 Judge Wright also granted the FRCP 11 sanction motions filed by the Thirteenth Circuit Bar Committee and Evans & Dixon and stayed action on their motions for dismissal and summary judgment pending completion of sanction proceedings.

Evans & Dixon waived FRCP 11 sanctions on February 16, and on March 8 the Thirteenth Circuit Bar Committee did the same. Subsequently, on March 16, Judge Wright granted the Thirteenth Circuit Bar Committee's motion to dismiss for failure to state a cause of action and granted Evans & Dixon's motion for dismissal for failure to state a cause of action and alternative summary judgment motion; on March 16 Judge Wright also amended his February 13 order by not charging FRCP 11 sanctions against Alexander in favor of the Thirteenth Circuit Bar Committee and Evans & Dixon.

The Board of Law Examiners filed motions for summary judgment and FRCP 11 sanctions on February 15; on March 16 Judge Wright granted the motion for FRCP 11 sanctions and stayed the summary judgment

motion pending completion of sanction proceedings. On May 11, Judge Wright granted the summary judgment motion and awarded sanctions to the Board. (Note: Because FRCP 11 sanctions were not awarded in favor of the Thirteenth Circuit Bar Committee, this brief does not address the issue of the propriety of such sanctions.)

Alexander filed a premature notice of appeal on March 20 (because there were no final rulings on the motions of the Board of Law Examiners until May 11). On May 18 Alexander "re-entered" his Notice of Appeal.

Summary of District Court Disposition

As set out in the Appendix to Alexander's Petition and in the District Court file, the District Court disposition was:

As to the Thirteenth Circuit Bar Committee: Motion to dismiss for failure to state cause of action granted March 16, 1990. Motion for FRCP 11 sanctions waived.

As to Evans & Dixon: Motion to dismiss for failure to state cause of action and alternative motion for summary judgment granted March 16, 1990. Motion for FRCP 11 sanctions waived.

As to Board of Law Examiners: Motion for summary judgment and for FRCP 11 sanctions granted on May 11, 1990. $3,200 awarded to the Office of the Missouri Attorney General. $5,000 awarded to the law firm of Swanson, Midgley.

Disposition in Court of Appeals

As set out in the Appendix to Alexander's Petition, on October 11, 1990, the United States Court of Appeals for the Eighth Circuit concluded Alexander's appeal was frivolous, summarily affirmed the District Court, and imposed $500 damages on Alexander pursuant to FRAP 38, plus double costs.

Statement of Facts

Alexander was in the middle of his second year at the University of Missouri-Columbia School of Law in December 1989. (January 2, 1990 letter attached to Alexander's Petition) On December 27, 1989, Richard K. Andrews, secretary of the Board of Law Examiners, sent a letter to Alexander advising that the Board had denied Alexander's Application for Law Student Registration, that the Board would not be favorably disposed to recommend approval of any subsequent application by Alexander for admission to the bar, and that Alexander had the right to a hearing before the Board if he disagreed with the Board's action. The letter stated:

> The matters contained in your Application for Law Student Registration reflect overwhelming evidence of your instability and inability to manage your personal affairs, including: three criminal prosecutions for assault, theft and tampering with a utility meter (all of which were dismissed); traffic violations so numerous that you did not list them; ten civil actions, in most of which you were the plaintiff and three of which are still pending; an unpaid judgment in excess of $23,000 which

> you discharged by taking bankruptcy; two personal bankruptcies in 1970 and 1982; three divorces; and more than 25 different employments. One who has exhibited such a high degree of personal instability and inability to manage one's own affairs is ill-suited to counsel and represent others in the handling of their legal affairs.

(December 27, 1989 letter attached to Alexander's Petition and included in Appendix to Alexander's Brief)

Alexander responded with a letter to Andrews which not only demanded a hearing before the Board but also set out at great length Alexander's allegations that the Board's action resulted from a conspiracy involving the Board, the Thirteenth Circuit Bar Committee, Evans & Dixon, and even various judges of the St. Louis County and City Circuit Courts, the Eastern District Missouri Court of Appeals and the Missouri Supreme Court. (January 2, 1990 letter attached to Alexander's Petition)

As detailed in Alexander's January 2, 1990 letter and subsequent First Amended Petition and other filings, here is the gist of Alexander's allegations:

- Alexander was a *pro se* plaintiff in a lawsuit originally filed in St. Louis County Circuit Court against AAIM Management Association and later transferred to St. Louis City Circuit Court on a change of venue. Evans & Dixon represented AAIM.
- Alexander disagreed with various pretrial rulings in the AAIM case and felt the judges were biased in favor of Evans & Dixon, whose attorneys he accused of lying, filing false affidavits and violating canons of legal ethics.
- Alexander sought a writ of mandamus from the Eastern District Missouri Court of Appeals, which was denied on the same day it was filed. He then sought a

writ of mandamus from the Missouri Supreme Court, which was also denied. Alexander thus suspects the judges of these two appellate courts of complicity in the conspiracy.

- Gerre S. Langton, a partner in Evans & Dixon, is a member of the Board of Law Examiners and an individual defendant/respondent in this case. Alexander alleges that because of Evans & Dixon's contacts with Alexander in the AAIM case and Alexander's complaints against Evans & Dixon, Langton conspired with members of the Thirteenth Circuit Bar Committee and the Board of Law Examiners to deny Alexander's Application for Law Student Registration.
- Alexander further alleges that the conspiracy against him also results from the fact that he has been "openly critical" of "bias and corruption" in several Missouri and Illinois courts.

As set out in the defendants/respondents' pleadings, the facts are:

- "Neither Gerre S. Langton nor any partner, agent or personal representative of the lawfirm of Evans & Dixon, had any personal knowledge about or participated in the decision by the Board of Law Examiners to deny Donald K. Alexander's Application for Law Student Registration." (Affidavit of Richard K. Andrews, Board of Law Examiners secretary, filed January 22, 1990)
- Gerre S. Langton stated: "I had no knowledge that Donald K. Alexander had filed an Application for Law Student Registration with the Board of Law Examiners, nor did I have any knowledge that his Application had been denied by the Board until ... I received a copy of Richard K. Andrew's ... letter addressed to Mr. Alexander [denying Alexander's application]." (Affidavit of Gerre S. Langton filed January 22, 1990)

- Gerre S. Langton further stated: "At no time have I had contact with any member of the Thirteenth Judicial Circuit Bar Committee concerning Donald K. Alexander's Application for Law Student Registration. At no time have I instructed any other person to contact any member of the Thirteenth Judicial Circuit Bar Committee to take any action with respect to Donald K. Alexander's Application for Law Student Registration." (Supplemental Affidavit of Gerre S. Langton filed March 5, 1990)
- The Thirteenth Circuit Bar Committee recommended approval of Alexander's Application for Law Student Registration. (Affidavit of John Scully filed January 18, 1990; Affidavit of John Scully filed February 2, 1990; Affidavit of Richard K. Andrews filed February 15, 1990 and Exhibit C thereto)
- Alexander still has rights to a hearing on the denial of his Application for Law Student Registration and an appeal to the Missouri Supreme Court, and the Missouri Supreme Court has provided an impartial surrogate for the Board of Law Examiners to conduct the hearing. (Affidavit of Richard K. Andrews filed February 15, 1990, pp. 11, 12)

SUMMARY OF ARGUMENT

Alexander's claims against the members of the Missouri Thirteenth Judicial Circuit Bar Committee were properly dismissed because the Committee members are entitled to absolute quasi-judicial immunity in performing their functions in the process of reviewing law student applications. The members operate as an arm of the Missouri Supreme Court in this process, performing adjudicative acts involving the exercise of discretion and judgment. Case law recognizes that determination of the composition of the bar is historically and traditionally a judicial function. Conclusory allegations of conspiracy do not overcome judicial immunity.

The District Court did not err in granting a stay of discovery sought by Alexander. Under the principle of judicial parsimony, the stay was appropriate because case-dispositive motions were then pending. Time and money would have been wasted had discovery been allowed to proceed—particularly in view of Alexander's clearly deficient pleadings and his inability to refute the summary judgment affidavits of the defendants/respondents.

The District Court properly sustained motions to dismiss for failure to state a cause of action and motions for summary judgment because Alexander's conclusory allegations of conspiracy were clearly insufficient under case law governing 42 U.S.C. §1983 cases and because he failed to refute the summary judgment affidavits filed by defendants/respondents. Case law in virtually every circuit refutes Alexander's notion that merely to charge conspiracy is to guarantee extensive discovery and a jury trial. The cases say that in §1983 cases, conspiracy must be pleaded by alleging facts sufficient to show a meeting of the minds and a common plan of action among the alleged conspirators. Alexander failed to allege such facts; instead, he

recited a series of events and inferred conspiracy from the events. Alexander's unsupported inferences were conclusively negated by the summary judgment affidavits filed by defendants/respondents, and his counter-affidavits were similarly devoid of factual support for his conspiracy theory.

In any event, Alexander could not have been entitled to recover from the Thirteenth Judicial Circuit Bar Committee because the Committee took no action against him but rather recommended approval of his Application for Law Student Registration.

Further, Alexander's action was properly dismissed because he failed to exhaust his state remedies. He still has the rights to a hearing before the Missouri Board of Bar Examiners and to an appeal to the Missouri Supreme Court. Because there has been no final decision on his Application for Law Student Registration and because he has not yet sustained damage, his claims are not ripe for determination under 42 U.S.C. §1983.

Finally, Alexander's conclusory allegations of conspiracy would not even make a case submissible to a jury, and no reasonable jury could find in his favor in the face of respondents' contrary evidence. This is particularly true with respect to the Thirteenth Judicial Circuit Bar Committee which took no action against him but rather recommended approval of his Application for Law Student Registration.

ARGUMENT

Point 1: Judicial Immunity

Question presented: Whether the individual members of the Missouri Thirteenth Judicial Circuit Bar Committee are entitled to judicial immunity in performing their function of reviewing applications for admission to the bar.

In their motions to dismiss, the members of the Thirteenth Circuit Bar Committee asserted absolute quasi-judicial immunity. The Missouri Circuit Bar Committees perform their functions in the process of reviewing law student applications under Missouri Supreme Court Rule 8.07 and Missouri Supreme Court Rule 5.26. Of particular note is Missouri Supreme Court Rule 5.27, which states in relevant part:

> . . . members of the . . . Circuit Bar Committees . . . acting in the course and scope of their official duties shall be considered as acting under the authority of this Court, and as such shall be a part of the Judicial branch of state government and shall be protected and be free from suits and judgments for damages. . . .

Thus, it is clear that the members of the Circuit Bar Committees, appointed by the Missouri Supreme Court under Missouri Supreme Court Rule 5.10, perform adjudicative acts involving the exercise of discretion and judgment. Given these facts, under the governing case law, District Judge Scott O. Wright was clearly correct in dismissing Alexander's action against the Thirteenth Circuit Bar Committee on the ground of quasi-judicial immunity.

Childs v. Reynoldson, 777 F.2d 1305, 1306 (8th Cir. 1985), held that members of the Iowa Board of Law Examiners "acted as an arm of or surrogate for the Supreme Court of Iowa," entitling the board members to "absolute quasi-judicial immunity" against suit by a bar applicant who twice failed the Iowa bar examination.

It is true that *Childs* predated the decision in *Forrester v. White*, 484 U.S. 219 (1988), in which this Court held that judges' non-judicial acts are not cloaked with immunity in 42 U.S.C. §1983 actions. However, the well-reasoned case of *Sparks v. Character and Fitness Committee of Kentucky*, 895 F.2d 428 (6th Cir. 1988), was decided in view of *Forrester* and concluded that the act of considering an application to the bar is a judicial act entitled to immunity even when performed by nonjudicial officers to whom it has been lawfully delegated. The plaintiff had alleged violation of various constitutional rights and sued under 42 U.S.C. §1983. In affirming the District Court's dismissal of the action against the Chief Justice of the Kentucky Supreme Court and the members of the Kentucky Board of Bar Examiners and the Character and Fitness Committee of Kentucky, the Sixth Circuit stated:

> Some functions performed by courts are so inherently related to the essential functioning of the courts as to be traditionally regarded as judicial acts. Determining the composition of the bar is just such an historic and traditional function. The establishment of criteria for determining the intellectual competence, academic preparedness, and moral fitness of persons who petition the court for the privilege of undertaking the confidential trust of serving the court as one of its professional officers has always been a function confined to the courts themselves.

And so it is in Missouri, where §484.040 RSMo. (1986) provides that the "power to admit and license persons to practice as attorneys and counselors in the courts of ... this state ... is hereby vested exclusively in the Supreme Court and shall be regulated by the rules of that Court." Thus, clearly, the members of the Thirteenth Circuit Bar Committee, appointed by the Missouri Supreme Court, are entitled to absolute immunity from Alexander's lawsuit.

See also *Rhodes v. Meyer*, 334 F.2d 709, 718 (8th Cir.), *cert. denied*, 379 U.S. 915 (1964) (state supreme court justices and members of state integrated bar, among others, entitled to immunity as a result of their performance of official tasks); *McCaw v. Winter*, 745 F.2d 533, 534 (8th Cir. 1984) (state judge and state court clerk, acting pursuant to judge's directions, protected by absolute immunity); *Simons v. Bellinger*, 643 F.2d 774, 777-85 (D.C. Cir. 1980) (members of District of Columbia Committee on Unauthorized Practice of Law entitled to absolute immunity in exercising inherently judicial power delegated by the court); and *Clark v. State of Washington*, 366 F.2d 678, 681 (9th Cir. 1966) (state bar association protected by absolute immunity in disbarment actions because association is an integral part of the judicial process).

Alexander's broad, conclusory allegations of conspiracy do not overcome judicial immunity. The doctrine of judicial immunity is recognized in 42 U.S.C. §1983 cases. *Pierson v. Ray*, 386 U.S. 547 (1967). Because absolute immunity forbids scrutiny of an official's motives, allegations that an action was taken pursuant to a conspiracy can mean no more than that the act was done in bad faith or with malice, neither of which defeats absolute immunity. The Eighth Circuit Court of Appeals has recently held that an allegation of conspiracy does not abrogate absolute judicial immunity. *Moses v. Parwatikar*, 813 F.2d 891, 893

(8th Cir. 1987). *Accord, Billingsley v. Kyser*, 691 F.2d 388, 389 (8th Cir. 1982); and *Smallwood v. United States*, 358 F. Supp. 398, 403-05 (E.D. Mo.), *aff'd*, 486 F.2d 1407 (8th Cir. 1973).

Accordingly, the District Court did not err in dismissing Alexander's claims against the members of the Thirteenth Circuit Bar Committee on the ground of judicial immunity, and the Court of Appeals did not err in dismissing Alexander's appeal on this ground.

Point 2: Discovery Protective Orders

Question presented: Whether the District Court erred in granting protective orders which stayed Petitioner's discovery pending rulings on case-dispositive motions.

Alexander filed extensive discovery requests, including interrogatories, document requests and requests for admission, on February 5, 1990. On February 6, 1990, Plaintiff filed a notice of taking depositions of 28 persons, including all the judges of the Missouri Supreme Court and several judges of the Eastern District Missouri Court of Appeals and the St. Louis City and St. Louis County Circuit Courts. On February 13, 1990, in response to motions filed by defendants, District Judge Wright entered a protective order staying all discovery. At that time, motions by the Thirteenth Circuit Bar Committee to dismiss Alexander's petition and by Evans & Dixon for summary judgment were pending. Also at that time, the Board of Law Examiners had requested additional time to file its response to Alexander's petition; additional time was granted on February 13, 1990, the same day the protective order was entered.

Alexander contends the entry of the protective order improperly denied him the right of discovery. To the contrary, Judge Wright's protective order was providently granted under the "principle of judicial parsimony" by which, where one issue may be determinative of a case, the court has discretion to stay discovery until the critical issue has been decided. ***See*** *Sinclair Refining Co. v. Jenkins Petroleum Process Co.*, 289 U.S. 689 (1972). When the order was entered, as noted, Judge Wright had before him Respondents' motions which likely would be case-dispositive, as discussed under Issues 3 and 4 below. It would have been a waste of time and money to have proceeded with discovery. Trial courts have broad discretion in granting protective orders and may be reversed only on a clear showing of abuse of discretion. *Sanden v. Mayo Clinic*, 495 F.2d 221 (8th Cir. 1974).

For a closely analogous case, see *Brennan v. Local Union No. 639*, 494 F.2d 1092 (D.C. Cir. 1974), in which the District Court had stayed all discovery until five days after ruling on a motion for summary judgment filed by the defendant Secretary of Labor. On appeal, the plaintiff union contended the stay of discovery was prejudicial. The appellate court disagreed, stating that the stay was within the trial court's discretion and did not deny due process in view of the ultimate determination that the union failed to raise any factual dispute as to a material fact and that the defendant was entitled to summary judgment. ***See also*** *Ellingson Timber Co. v. Great Northern Railway Co.*, 424 F.2d 497, 499 (9th Cir. 1970) (one purpose of rule authorizing separate trials is to permit deferral of costly and possibly unnecessary discovery proceedings pending resolution of potentially dispositive preliminary issues).

Thus, Judge Wright did not err in granting a stay of the discovery sought by Alexander, particularly in view of Alexander's clearly deficient pleadings and inability to

refute the summary judgment affidavits of the defendants/ respondents.

Point 3: Pleading of Conspiracy

Question presented: Whether a plaintiff proceeding under 42 U.S.C. §1983 is required to allege conspiracy with sufficient specificity to show a meeting of the minds and a common plan of action among the alleged conspirators.

The Thirteenth Circuit Bar Committee submits that the District Court properly dismissed Alexander's complaint because it did not sufficiently allege conspiracy. The fallacy of Alexander's contrary contention is easily demonstrated by pursuing his argument to its logical conclusion.

Alexander appears to take the position that whenever a plaintiff alleges a conspiracy, trial judges are prohibited from granting summary judgments or motions to dismiss in favor of defendants. His argument may be summarized as follows: Proof of a conspiracy is subtle; credibility of witnesses is a key, and only a jury can determine credibility; therefore, judges are precluded from judging the pleadings and affidavits and deciding that there are no genuine issues of fact or no cause of action. In short, according to Alexander, to charge conspiracy is to ensure a jury trial and extensive pretrial discovery.

Proving a conspiracy may be difficult, but charging conspiracy is easy. If Alexander's argument is accepted, the floodgates are open. Any aggrieved person need only dream up a "conspiracy" in order to harass and punish those making an adverse decision by dragging the decision-makers through time-consuming and expensive pretrial discovery and trials. At considerable taxpayer expense,

any aggrieved person will have a sure-fire method of making those who handed down the decision suffer.

Fortunately, the courts have recognized the problems posed by Alexander's position and have rejected it. Case law says that he who charges conspiracy must present detailed allegations of conspiracy to avoid dismissal or summary judgment. Mere suspicion is not enough. For example, in *Deck v. Leftridge*, 771 F.2d 1168, 1170 (8th Cir. 1985), a 42 U.S.C. §1983 case brought by a prisoner who charged that public defenders were conspiring with Missouri appellate judges, the Eighth Circuit stated in the course of upholding the District Court's dismissal of the complaint:

> [A]llegations of a conspiracy must be pleaded with sufficient specificity and factual support to suggest a "meeting of the minds." *Smith v. Bacon*, 699 F.2d 434, 436 (8th Cir. 1983); *see White v. Bloom*, 621 F.2d 276, 281 (8th Cir), *cert. denied*, 449 U.S. 995 ... (1980). To be sufficiently specific:
>
> > [t]he factual basis need not be extensive, but it must be enough to avoid a finding that the suit is frivolous. [Citation omitted.] Appellants must at least allege that "the defendants had directed themselves toward an unconstitutional action by virtue of a mutual understanding," and provide some facts "suggesting such a 'meeting of the minds.'" [Citation omitted.]

Accord, Manis v. Sterling, 862 F.2d 679 (8th Cir. 1989) (upholding dismissal of prisoner's 42 U.S.C. §1983 action alleging conspiracy between public defenders and judges where plaintiff's pleading lacked "sufficient specificity and

factual support to suggest a 'meeting of the minds'"); *Gometz v. Culwell*, 850 F.2d 461, 463-4 (8th Cir. 1988) (civil rights plaintiff's action dismissed where plaintiff failed to allege with sufficient particularity and demonstrate with specific material facts that defendants agreed and conspired together to deprive plaintiff of federally protected rights); *McClain v. Kitchen*, 659 F.2d 870 (8th Cir. 1981) (upholding dismissal of a prisoner's 42 U.S.C. §1983 action alleging conspiracy among a prosecutor, public defender and judge where plaintiff's pleading had "insufficient facts to support a claim for relief").

In the case at bar, District Judge Wright properly found insufficient factual support to maintain Alexander's 42 U.S.C. §1983 action alleging a conspiracy. Although the complaint is directed against Evans & Dixon, members of the Thirteenth Circuit Bar Committee, and members of the Board of Law Examiners, Alexander also appears to be alleging a multi-layered conspiracy among numerous other attorneys and judges not named as defendants. In conclusory fashion, Alexander alleges, "Defendants entered into said criminal conspiracy against plaintiff because plaintiff has been openly critical of the corruption and judicial bias which plaintiff alleges exists within several Missouri and Illinois Courts...." (Plaintiff's Petition, ¶2) Alexander also alleges that "said criminal conspiracy ... was intentional, willful, wanton, with great malice and hatred, with intent to injure, oppress, threaten, and intimidate plaintiff because plaintiff sought to exercise his constitutional rights to challenge the false affidavit, lies, and breach of legal ethics perpetrated upon plaintiff by Evans & Dixon Law Firm in open court...." (Plaintiff's Petition, ¶3) Alexander incorporated his letter to Richard Andrews, secretary of the Board of Law Examiners, as part of his petition. It is in this letter that he alleges a multi-faceted conspiracy which includes many judges. In the

fourth paragraph of the letter he states, again in conclusory fashion, that Evans & Dixon acted "in collusion with Judge Gallagher and Judge Mehan" in a case in which Alexander sued AAIM Management Association for breach of contract and slander. Alexander continues:

> Then, Evans & Dixon, in further collusion with Judge Mehan, moved my case up on Judge Mehan's equity docket for an early trial in order to frustrate any possible relief which I might obtain through the appellate process. I then filed a fully documented, seventy-page writ of mandamus with the Missouri Court of Appeals, Eastern District. The clerk stamped the writ as received at approximately 4:30 P.M. Incredibly, on the same day, within a half hour, the appellate judges summarily denied my writ, and a letter of denial was typed and mailed to me before 5:30 P.M. on the same day!! Thus, the appellate judges approved the actions by Evans & Dixon, Judge Saitz, Judge Mummert, Judge Gallagher, and Judge Mehan. I then filed the writ with the Missouri Supreme Court wherein all of my foregoing allegations were fully documented and adequate proof contained in the writ exhibits. The Missouri Supreme Court judges approved the lies and treachery perpetrated by Evans & Dixon as well as the judicial bias on the part of Judges Saitz, Mummert, Gallagher, and Mehan by summarily denying my writ without comment....

In the fifth paragraph of the letter, Alexander states:

> Further evidence of the criminal conspiracy to oppress me with regard to exercising my constitutional rights is clearly seen in the fact that Gerre S. Langton, a partner in the Evans

> & Dixon law firm, is a member of the Missouri State Board of Law Examiners and conspired in the decisions reached by the board....

After motions were filed attacking his original Petition, Alexander filed a First Amended Petition which purported to amplify on the matters set out in the original Petition; the First Amended Petition, however, is largely a rehash of matters included in the letter attached to the original Petition. Nowhere in the Petition or First Amended Petition does Alexander present the "sufficient specificity and factual support to suggest a 'meeting of the minds'" or mutual understanding of the alleged conspirators which the Eighth Circuit demanded in *Smith*, 699 F.2d at 436, and *Deck*, 771 F.2d at 1170. Judge Wright, in dismissing Alexander's complaint and granting summary judgment for the defendants, was upholding the law. Other than by piling unsupported inference on unsupported inference, Alexander does not demonstrate any conspiratorial link between the large law firm of Evans & Dixon and the members of the Thirteenth Circuit Bar Committee and the Board of Law Examiners. While Alexander alleges conspiracy in conclusory fashion, affidavits filed by the defendants eliminate any possible link, let alone a "meeting of the minds" in a conspiracy. According to the affidavit of Richard K. Andrews, Secretary of the Board of Law Examiners (filed January 22, 1990), "Neither Gerre S. Langton nor any partner, agent or personal representative of the lawfirm of Evans & Dixon, had any personal knowledge about or participated in the decision by the Board of Law Examiners to deny Donald K. Alexander's Application for Law Student Registration." The affidavit of Gerre S. Langton (filed January 22, 1990) states: "I had no knowledge that Donald K. Alexander had filed an Application for Law Student Registration with the Board of Law Examiners, nor did I have any knowledge that his

Application had been denied by the Board until ... I received a copy of Richard K. Andrew's ... letter addressed to Mr. Alexander [denying Alexander's application]." The supplemental affidavit of Gerre S. Langton (filed March 5, 1990) adds: "At no time have I had contact with any member of the Thirteenth Judicial Circuit Bar Committee concerning Donald K. Alexander's Application for Law Student Registration. At no time have I instructed any other person to contact any member of the Thirteenth Judicial Circuit Bar Committee to take any action with respect to Donald K. Alexander's Application for Law Student Registration." Finally, any inkling of participation in a conspiracy by the members of the Thirteenth Circuit Bar Committee is conclusively dispelled by the fact, as mentioned above, that the committee recommended approval of Alexander's Application for Law Student Registration.

The Eighth Circuit is not alone in demanding specificity when a plaintiff alleges conspiracy in a 42 U.S C. §1983 case.

The First Circuit Court of Appeals has ruled that mere conclusory allegations are insufficient. *Slotnick v. Staviskey*, 560 F.2d 31, 33-34 (1st Cir. 1977), *cert. denied*, 434 U.S. 1077 (1978). In *Slotnick*, the plaintiff alleged a conspiracy among a state court judge, a credit union, a banking commissioner, and others. *Id.* at 32. The First Circuit upheld the District Court's dismissal of the suit, saying:

> In an effort to control frivolous conspiracy suits under §1983, federal courts have come to insist that the complaint state with specificity the facts that, in the plaintiff's mind, show the existence and scope of the alleged conspiracy. It has long been the law in this and other circuits that complaints cannot survive a motion

> to dismiss if they contain conclusory allegations of conspiracy but do not support their claims with references to material facts.

Id. at 33 (citations omitted).

In another First Circuit case, *Francis-Sobel v. University of Maine*, 597 F.2d 15 (1st Cir. 1979), the plaintiff alleged discrimination and a conspiracy between the Equal Employment Opportunity Commission (EEOC) and the University of Maine. The First Circuit, however, found the pleadings "devoid of any factual allegations that would tend to link" the EEOC and the university. As the Court noted, "Pleading conspiracy under sections 1983 & 1985(3) requires at least minimum factual support of the existence of a conspiracy." *Id.* at 17. The Court upheld dismissal of the complaint. *Id.* at 18.

The Second Circuit ordered the entry of a summary judgment in a 42 U.S.C. §1983 conspiracy case, *San Filippo v. United States Trust Co.*, 737 F.2d 246 (2d Cir. 1984), *cert. denied*, 470 U.S. 1035 (1985), in which the District Court had overruled the defendants' summary judgment motion. The Second Circuit said, "We conclude that plaintiff's failure to allege any material facts to support his conclusory allegation of conspiracy warrants summary dismissal of his complaint...." *Id.* at 248. The Court made clear that "completely unsubstantiated allegations of conspiracy are insufficient to state a valid claim for relief under §1983, or, in the alternative, to defeat defendants' motion for summary judgment." *Id.* at 256. For district court cases following *San Filippo*, see *Green v. City of N.Y. Medical Examiner's Office*, 723 F. Supp. 973, 975 (S.D.N.Y. 1989) (summary judgment, complaint dismissed because of "[n]o evidentiary facts...set forth in the complaint sufficient to support the claim of conspiracy, which on its face is incredible"), and *Katz v. Morgenthau*, 709 F. Supp. 1219, 1231 (S.D.N.Y. 1989) (summary judgment where "[plain-

tiff] blithely charges conspiracy by painting a picture of a personal vendetta of all twenty-three named defendants through conclusory allegations....").

A District Court case in the Third Circuit, *Martin v. Delaware Law School*, 625 F. Supp. 1288, 1292 (D. Del. 1985), involved the plaintiff's claim that a conspiracy was depriving him of the "opportunity to practice law, in violation of 42 U.S.C. §1983." The trial judge said, "Plaintiff's allegations that [Delaware Law School] conspired with the State of Pennsylvania to deprive him of his constitutional rights are ... insufficient to state a claim under Section 1983. ... [S]uch conspiratorial conduct must be pleaded with specificity." *Id.* at 1301 (citations omitted).

The Fifth Circuit likewise holds that when allegations of conspiracy are "wholly conclusory and unsupported," the allegations "cannot withstand a motion for summary judgment." *Henzel v. Gerstein*, 608 F.2d 654, 659 (5th Cir. 1979) (42 U.S.C. §§ 1983 and 1985 action; summary judgments for defendants upheld). ***See also*** the 42 U.S.C. §1983 conspiracy action of *Storey v. United States*, 629 F.2d 1174, 1177 (N.D. Miss., 1986) ("A bare allegation ... is no evidence of conspiracy"; summary judgment for defendants granted).

The Seventh Circuit has this to say about conspiracy charges brought under 42 U.S.C. §1983:

> It is not sufficient to allege that the [private and state] defendants merely acted in concert or with a common goal. There must be allegations that the defendants had directed themselves toward an unconstitutional action by virtue of a mutual understanding. Even were such allegations to be made, they must further be supported by some factual allegations suggesting such a "meeting of the minds."

Tarkowski v. Robert Bartlett Realty, 644 F.2d 1204, 1206 (7th Cir. 1980) (quoting *Sparkman v. McFarline*, 601 F.2d 261, 268 (7th Cir. 1979) (en banc) (concurring opinion of Sprecher, J.). In upholding dismissal of the plaintiff's claim, the Court in *Tarkowski* made clear that "[m]ere conjecture that there has been a conspiracy is not enough to state a claim." *Tarkowski*, 644 F.2d at 1208.

The Ninth Circuit likewise says that "more than vague conclusory allegations are required to state a claim" of conspiracy in a 42 U.S.C. §1983 action. *Mosher v. Saalfield*, 589 F.2d 438, 441 (9th Cir. 1978) (summary judgment upheld). In a later case, *Fonda v. Gray*, 707 F.2d 435 (9th Cir. 1983), the Ninth Circuit affirmed granting summary judgment for the defendants when the plaintiff alleged that banks conspired with the FBI to violate her constitutional rights. Bank employees had allowed the FBI to view the plaintiff's bank records. The Ninth Circuit said: "To prove a conspiracy between private parties and the government under §1983, an agreement or 'meeting of the minds' to violate constitutional rights must be shown. ... While it is not necessary to prove that each participant in the conspiracy knew the exact parameters of the plan, they must at least share the general conspiratorial objective." *Id.* at 438 (citations omitted). The banks, according to the Ninth Circuit, dispelled the inference of improper motives by stating they were ignorant of any plan to harm the defendant. *Id.* For a recent Ninth Circuit case upholding dismissal of a 42 U.S.C. §1983 action alleging conspiracy of a judge with a law firm, see *Schucker v. Rockwood*, 846 F.2d 1202, 1205 (9th Cir. 1988) ("Conclusory allegations ... are insufficient").

Finally, the Tenth Circuit Court of Appeals also demands that "[w]hen a plaintiff in a 42 U.S.C. §1983 action attempts to assert the necessary 'state action' by

implicating state officials or judges in a conspiracy with private defendants, mere conclusory allegations with no supporting factual averments are insufficient; the pleadings must specifically present facts tending to show agreement and concerted action." *Sooner Products Co. v. McBride*, 708 F.2d 510, 512 (10th Cir. 1983).

In short, unsubstantiated, conclusory allegations which amount to nothing more than mere conjecture of conspiracy will not withstand motions for dismissal or summary judgment in at least the First, Second, Fifth, Seventh, Eighth, Ninth, and Tenth Circuits. The conclusory, unsubstantiated conjecture by Alexander would not survive motions for dismissal or summary judgment in any of these circuits. Faced with Alexander's unsubstantiated conspiracy theory, Judge Wright had no choice but to grant summary judgment to the defendants/respondents.

In summary, Alexander simply failed to meet the threshold requirements to avoid summary judgment or dismissal for failure to state a claim. To accept Alexander's argument that any conspiracy charge must necessarily require pretrial discovery and trial is beyond law and reason. Our system of justice does not countenance such pandering to paranoia. The business of the courts and administrative agencies could grind to a halt if every charge of conspiracy necessitated trial. Following Alexander's "logic" still further, if all conspiracy charges necessitate trial and if the trial court's decision is adverse, where does the "conspiracy" end? Could it be that jurors somehow conspired? Perhaps the state was involved in a conspiracy in selecting the jury panel. This conspiracy charge could then be heard by another jury, and so on, *ad infinitum*. If given full reign, the conspiracy theory would never end. But end it must—with the trial judge granting a summary judgment or dismissing a claim when unsub-

stantiated, conjectural and conclusory allegations of conspiracy are made.

Although Alexander's complaint vaguely charges that the Thirteenth Circuit Bar Committee conspired with co-defendants to deprive Alexander of his rights, the case-dispositive fact in favor of the Thirteenth Circuit Bar Committee is that the committee took no action against Alexander but rather recommended approval of Alexander's Application for Law Student Registration. (Affidavit of John Scully filed January 18, 1990, pp. 1-2; Affidavit of John Scully filed February 2, 1990, pp. 1-2; Affidavit of Richard K. Andrews filed February 15, 1990, p. 4, and Exhibit C thereto) Even Alexander admitted this fact. (Alexander Suggestions and Affidavit filed February 21, 1990, p. 6) Thus, the Thirteenth Circuit Bar Committee did not subject Alexander "to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. §1983.

Further, it is difficult to understand how the Thirteenth Circuit Bar Committee could be liable to Alexander in any event because the committee's role in registration of law students is investigatory, and it has no final authority in such matters. Missouri Supreme Court Rule 8.07.

Thus, the District Court properly dismissed Alexander's complaint against the Thirteenth Circuit Bar Committee on the ground that no showing was made that the Committee deprived Alexander of any rights, privileges or immunities.

Point 4: Summary Judgment

Question presented: Whether a plaintiff alleging conspiracy in a 42 U.S.C. §1983 action can overcome summary judgment affidavits specifically denying the

alleged conspiratorial facts with counter-affidavits alleging conspiracy in a conclusory manner.

Alexander addressed the pleading and summary judgment issues in separate points in his Petition for Writ of Certiorari. However, the Thirteenth Circuit Bar Committee submits that the issues are so intertwined that they must be considered together, which has been done in Point 3 above. Accordingly, for its argument under this point, the Committee incorporates Point 3 above.

As noted under Point 3, it should be stressed that Alexander's affidavits in opposition to the summary judgment affidavits filed by the Respondents were conclusory in nature and consisted of little more than reiteration of his grandiose conspiracy theory with no supporting facts.

Point 5: Ripeness

Question presented: Whether Petitioner's 42 U.S.C. §1983 claim was not ripe for determination in that Petitioner failed to exhaust his state remedies.

The members of the Thirteenth Circuit Bar Committee also moved to dismiss Alexander's action on the ground that he had failed to exhaust his remedies.

Specifically, Missouri Supreme Court Rule 8.12 entitles Alexander to a hearing before the Board of Law Examiners and a subsequent appeal to the Missouri Supreme Court. In fact, Alexander still has this hearing and appeal right, and the Missouri Supreme Court has provided an impartial surrogate for the Board of Law Examiners to conduct the hearing. (Suggestions of Board of Law Examiners filed February 15, 1990, pp. 17, 18)

The issue of exhaustion of remedies in the context of the present case may be viewed as one of ripeness, as it was in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985). In that case, the plaintiff land developer had not obtained a final decision regarding application of land-use regulations to its property when it filed a 42 U.S.C. §1983 action alleging a taking of property without just compensation. This Court held that because there was no final decision, the claim was not ripe for determination in a §1983 action. Likewise, in the present case, because there has been no final denial of Alexander's Application for Law Student Registration, Alexander's claim is not ripe for determination under 42 U.S.C. §1983.

See also *Feldman v. State Board of Law Examiners*, 438 F.2d 609, 702-03 (8th Cir. 1971) (recommendation of Arkansas Board of Law Examiners to deny plaintiff admission to the bar was not final and did not give rise to §1983 action); and *Chaney v. State Bar of California*, 386 F.2d 962, 966-67 (9th Cir. 1967) (California Committee of Bar Examiner's refusal to certify applicant to California Supreme Court for admission to the bar did not give rise to §1983 action because final decision rested with California Supreme Court). ***Compare*** *West v. Missouri Board of Law Examiners*, 520 F. Supp. 159, 160 (E.D. Mo.), *aff'd*, 676 F.2d 702 (8th Cir. 1981) (plaintiff who received adverse recommendation for admission to bar from Missouri Board of Law Examiners failed to exhaust remedies by not completing appeal to Missouri Supreme Court before filing federal court action; unclear whether case was filed under 42 U.S.C. §1983).

In view of the foregoing, it is clear that District Judge Wright properly dismissed Alexander's claim against the Thirteenth Circuit Bar Committee because his claim is not ripe for determination in that he has failed to pursue the

remedies available to him under Missouri Supreme Court Rule 8.12. Although Alexander attempts to cast his suit as one for damages resulting from the unfavorable recommendation of the Board of Law Examiners, Alexander has not yet sustained any damage because there is no final determination that he will not be permitted to sit for the bar examination in Missouri.

Point 6: Jury Question

Question presented: Whether a jury could reasonably return a verdict in Petitioner's favor based on Petitioner's allegations.

The Thirteenth Circuit Bar Committee addresses this issue at this point only because it was advanced by Alexander. However, the Committee submits that if it is appropriate to consider this question at all, it should only be considered in the context of conspiracy pleading requirements in 42 U.S.C. §1983 cases and the propriety of granting summary judgment—matters which were discussed in Point 3 above and which are incorporated by reference on this point.

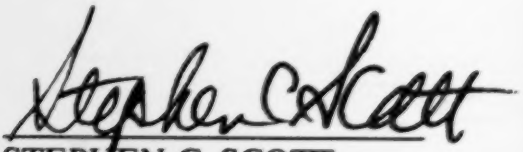
In any event, it is evident that Alexander's conclusory allegations of conspiracy would not even make a case submissible to a jury and that no reasonable jury could find in Alexander's favor in the face of the Respondents' contrary evidence.

It is particularly the case that no reasonable jury could find against the Thirteenth Circuit Bar Committee because, as mentioned above, the Committee *took no action adverse to Alexander but rather recommended approval of his application.*

CONCLUSION

In conclusion, Respondents Loramel P. Shurtleff, Thomas M. Dunlap, Bruce Beckett, Betty K. Wilson and Nancy Galloway, individual members of the Missouri Thirteenth Judicial Circuit Bar Committee, submit that the United States Supreme Court should disallow Petitioner's Petition for Writ of Certiorari on the grounds and for the reasons set out above. As demonstrated above, the Eighth Circuit Court of Appeals did not render a decision in conflict with the decision of another Court of Appeals, nor did it depart from the accepted and usual course of judicial proceedings or sanction such a departure by the District Court. Further, the Court of Appeals decision is not in conflict with applicable decisions of this Court, and this case does not involve important federal law questions which should be settled by this Court.

Respectfully submitted,



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